

# Senator Charles Poochigian



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## THE GOOD, THE BAD AND THE UGLY IN WORKERS' COMPENSATION REFORM

*"The worst thing this Legislature can do is trumpet the success of reforms which are inadequate, incomplete and laced with loopholes. Let me be clear – updated medical fee schedules and utilization controls are important but simply not enough. We must make monumental changes to all segments of the system."*

– Senator Chuck Poochigian

California's workers' compensation system has spiraled out of control. After months of select committee hearings and town hall meetings throughout the state, the Legislature last month established a special bi-partisan conference committee to address workers' compensation reform. As the conference committee begins its work in earnest next week, it is important to review the items which are under consideration. The crisis is finally receiving a good deal of attention. Unfortunately, many of the reform plans do not contain some basic, absolutely critical reforms despite claims of being comprehensive. We must proceed with vigilance.

### FOUR GENERAL TENETS

In order for the conference committee to be successful, the committee must adopt the following guiding principles in its deliberations:

1. The conference committee cannot accept additional expansions of workers' compensation costs nor can it include increased workers' compensation taxes ("user fees") to fund the system's bureaucracy, as proposed by Governor Davis.
2. The conference committee must examine and propose meaningful and quantifiable reforms to all major cost drivers of the system.
3. The conference committee objective should be to implement reforms that will yield at least \$11 billion in written premium savings, based on actuarially sound principles. \$11 billion in savings will bring the total costs down to year 2000 figures (still billions higher than costs in 1998).
4. The conference committee cannot hold workers' compensation reforms hostage to burdensome and damaging business mandates, e.g. universal health care.

### THE UGLY – WHAT IS MISSING FROM THE DISCUSSION?

The workers' compensation "discussion" has taken many forms, including the bills which have drifted through the Legislature as well as reform plans announced periodically. Thus far the debate has failed to focus on many of the largest "cost drivers" in the system. Some legislative and executive branch

elected officials and staff have already declared (even before the first hearing of the conference committee) that whole issues are “off the table.” None of the bills in the conference committee do any of the following:

- Mandate objective medical findings to assess initial compensable injury
- Mandate objective medical findings to determine permanent disability
- Suspend the major benefit increases until real savings can be achieved
- Curtail the abuse of stress claims
- Eliminate non-work related injuries from the system (eliminate predominant cause standard)
- Fix California’s unique, ineffective and costly vocational rehabilitation program
- Repeal the \$10,000 cashout provision added to the vocational rehabilitation program
- Significantly curb the litigation costs in the system
- Require apportionment when injury is to the same part of the body
- Repeal “liberal construction” mandate of the Labor Code
- Correct the definition of what it means to “cure and relieve” injured employees
- Ensure classification system is appropriate and fair

## **THE BAD – PROPOSALS WITH MASSIVE LOOPHOLES**

The Legislature *has* expressed interest in dealing with some of the medical cost drivers in the workers’ compensation system. While the specific language of the bills has yet to be provided, it is critical to ensure that the limited proposals which may move forward be drafted without ambiguity which invites legal challenges. The sad reality is that, despite the original “bargain” to keep claims out of the court system in return for 100% subsidized care and compensation, this system is fraught with litigation. It is not litigation in the traditional sense. It is a separate “judicial” system, complete with its own judges and rules for jurisprudence. Loopholes have been created, either by design or by accident, that lead to abuses, delay and high costs. Moreover, these loopholes have a chilling effect even before claims are filed.

Also of concern to many who seek real reform is the concept of “costing” these proposals – or, in other words, identifying realistic dollar figures of the savings which may result from reforms. Without independent verification that the reforms create actual, quantifiable cost savings, no good will come from the passage of a “reform bill” no matter how triumphantly it is touted.

For example, the California Commission on Health Safety and Workers’ Compensation identifies that the outpatient medical fee schedule will save \$823 million from outpatient surgery centers, yet it has been asserted that the *total* cost of payments to surgery centers was only \$676 million in 2002.

The following proposals are under consideration and must be drafted properly in order to ensure that actual cost savings can be derived:

### **Medical Fee Schedule**

*The conference committee proposal must not allow the administrative director or the appeals board to independently and arbitrarily modify allowable fees, regardless of the published fee schedule, based simply on the ambiguous “reasonableness standard.”* Such a broad standard is ripe for litigation and therefore dampens the cost savings attributable to the improved fee schedule.

### **Utilization Schedule and Review**

*The conference committee proposal must include a “presumption of correctness” by amending the overarching Labor Code 4600 which governs the degree to which medical care must be provided. Labor Code 4600 states that all treatment that is “reasonably required to cure or relieve from the effects of the injury shall be provided by the employer.” Without specifying that the utilization schedule and its subsequent application as well the below mentioned IMR are presumed correct within the context of Labor Code 4600, utilization review and IMR will not alter outcomes.*

### **Independent Medical Review (IMR)**

*The conference committee proposal must be binding and must include a “presumption of correctness” in accordance with Labor Code 4600. If the decision of an independent medical review panel is not binding, as is the case in managed care, then IMR simply becomes yet another costly second opinion which has the effect of raising costs rather than yielding savings.*

### **Alternative Dispute Resolution (ADR)**

*The conference committee proposal must apply to all industries and be based on the construction trades model. ADR, which is provided to specific large unionized companies and is a negotiated program, has been successfully used in the construction industry. Unfortunately, subsequent authorizing statutes have created programs for other industries which include “poison pills,” rendering them unusable.*

### **Excessive Section 5814 Penalty Claims**

*The conference committee proposal must provide a stable, fair and non-escalating penalty structure for late claims and prohibit claims when an injured worker’s treatment is not affected and impaired. Labor Code 5814 imposes unreasonable penalties for late payment, even when a worker’s treatment or benefits are not affected.*

### **Fraud**

*The conference committee proposal must be evenhanded by punishing all perpetrators of fraud. The proposal outlined by the Governor singles out employer fraud by enhancing penalties yet ignores employee fraud.*

## **THE GOOD**

Lastly, there are items included in various proposals which are beneficial, albeit to a limited extent, but will improve the system nevertheless:

### **Elimination of 5814 Claims to CIGA**

As noted above, Labor Code 5814 is unfair and unreasonable. The Department of Insurance proposal to eliminate the mandate which holds the California Insurance Guarantee Association (CIGA) responsible for 5814 violations of a defunct insurer is a supportable proposal.

### **Use of Generic Drugs**

Generic drugs, while used in the workers’ compensation system, are not mandated. There seems to be universal agreement that mandated use of generic drugs is appropriate.

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## **CONTACT INFORMATION**

Senator Poochigian's website can be found by visiting: <http://republican.sen.ca.gov/web/14> .

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